

# Employer's Obligations under the New York State Human Rights Law

- ◆ The New York State Human Rights Law (NYSHRL) prohibits discrimination against persons with disabilities in the employment context.
- ◆ The NYSHRL covers employers with four (4) or more employees and applies to employment agencies, labor organizations and apprentice programs.
- ◆ The NYSHRL provides broader coverage than the Americans with Disabilities Act (ADA), which applies to employers with fifteen (15) or more employees.

# ADA Definition of Disability

- ◆ The Americans with Disabilities Act [(42 U.S.C.A 12102(2)(A)] defines “disability” as
- ◆ “a physical or mental impairment that substantially limits one or more major life activities of such individual;
- ◆ a record of such an impairment; or
- ◆ being regarded as having such an impairment.”

# Definition of “Disability”

The New York State Human Rights Law defines “disability” as:

- ◆ a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function, or is demonstrable by medically accepted clinical or laboratory techniques, or
- ◆ a record of such an impairment, or
- ◆ a condition regarded by others as having such an impairment.

# NYSHRL vs. ADA

- ◆ The ADA requires a “substantial limitation of one or more major life activities” for an individual to be considered disabled and protected under the law.
- ◆ No such qualifier under the NYSHRL, and no mention of “major life activities.”
- ◆ Essentially, NYSHRL requires a physical, medical or mental impairment that prevents the exercise of a normal bodily function.

# NYSHRL v. ADA

- ◆ In *Ruhlmann v. Ulster County Dept. of Social Services*, the court held that although the employee who had bipolar disorder was not disabled for purposes of Americans with Disabilities Act, he was disabled within meaning of New York law.[1]
- ◆ [1] 234 F. Supp 2d 140 (N.D.N.Y. 2002)

# Regarded as Disabled

- ◆ In *Ashker v. International Business Machines Corp.*, the Appellate Division Third Department held,
- ◆ “that a former employee who alleged that she was forced to retire after her employer required her to undergo psychological evaluation on grounds that she was considered dangerous to herself and others stated cause of action under Human Rights Law provision prohibiting discrimination against disabled persons; statutory language is sufficiently broad and legislative history sufficiently supportive of interpretation that nondisabled individuals whom employer wrongfully perceives as impaired are within reach of statute.”[\[1\]](#)
- ◆ [\[1\]](#) 168 A.D. 2d 724, 563 N.Y.S. 2d 572 (App Div. 3rd Dept. 1990).

# Temporary Disabilities

- ◆ A current employee experiencing a temporary disability is protected by the NYSHRL, where the individual will be able to satisfactorily perform the duties of the job after accommodation in the form of a reasonable time for recovery.
- ◆ The NYSHRL requires no more than de minimis accommodations for temporary disabilities in the areas of worksite accessibility, acquisition or modification of equipment, job restructuring or support services for persons with temporarily impaired hearing or vision.

# Must be Qualified

- ◆ Under the NYSHRL, an employee with a disability must be qualified for the job, and be able to satisfactorily perform the “essential functions” of the job with or without reasonable accommodation.

# Must be Qualified

- ◆ If an employee with a disability is unqualified for a position, there is no obligation on the part of an employer to hire such individual. In *Lamotta v. New York City Transit Authority*, the Appellate Division Second Department held that,
- ◆ “pursuant to standards of medical fitness, presence of seizure disorder was sufficient cause for discharge of police candidate, and thus, probationary city transit police officer, who was terminated because of seizure disorder, failed to state claim of discrimination based upon her disability, where uncontradicted medical evidence indicated that officer suffered from seizure disorder prior to her discharge and was medically unqualified to perform activities involved in position.” [\[1\]](#)
- ◆ [\[1\]](#) 165 A.D.2d 875, 560 N.Y.S.2d 346 (App. Div. 2nd Dept. 1990).

# Must be Qualified

- ◆ In *Pageau v. Tolbert*, petitioner applied for a position with the New York City Department of Corrections as a Corrections Officer. In *Pageau* the Appellate Division Third Department held,
- ◆ “that where petitioner admitted that he could not raise his right arm above chest level or put it behind his head, there could be a threat to the health and safety of petitioner, other correction officers, inmates or the public if petitioner were called upon to perform such actions as lifting a baton over his head in defense. Under the Executive Law, an employer may refuse to hire a candidate if a disability prevents the candidate from performing in a reasonable manner the activities involved in the job.”[\[1\]](#)
- ◆ [\[1\]](#) 304 A.D.2d 1067, 758 N.Y.S.2D 712 (App. Div. 3rd Dept. 2003).

# “Essential Functions” of the Job

- ◆ The “essential functions” of the job are defined as those fundamental to the position.
- ◆ Evidence for determining the “essential functions” of a particular position include:
  - the employer’s judgment as to which functions are essential, particularly where so indicated in a pre-existing written job description;
  - how often the function is actually performed by other employees in the position;
  - the direct and specific consequences to the employer’s business if the function is not performed by the particular disabled individual.

# Unlawful Discriminatory Practices

- ◆ Refusal to hire, interview, promote on account of disability.
- ◆ Termination on account of disability.
- ◆ Diminishing compensation, conditions, or privileges of employment on account of disability.
- ◆ Refusal to reasonably accommodate the known disability of a qualified employee, or prospective employee.
- ◆ Employers can not inquire about an employee's OR job applicant's disability UNLESS an employee has made a request for reasonable accommodation.

# Pregnancy

- ◆ An employer can not compel an employee who is pregnant to take a leave of absence, **UNLESS** the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

# Reasonable Accommodations

- ◆ It shall be an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation to the known disabilities of an employee, or prospective employee in connection with a job or occupation sought, provided however, that such actions do not impose an undue hardship on the business.

◆ Reasonable accommodations include:

- provision of an accessible worksite;
- acquisition or modification of equipment;
- support services for persons with hearing or vision impairments; and
- job restructuring and modified work schedules.

◆ Reasonable Accommodations do NOT include:

- providing non-work related aids, such as a personal hearing aid or wheelchair, which are the employee's own responsibility;
- the creation of a completely unique position with either qualifications or functions tailored to the disabled individual's abilities.

- ◆ Circumstances that give rise to the requirement that the employer consider reasonable accommodation include:
  - where the disability and need for accommodation are known to the employer;
  - when a qualified applicant or employee with a disability informs the employer of the disability (if the employer does not already know of its existence) and requests accommodation.
  - when a current employee with a disability informs the employer of the disability (if the employer does not already know of its existence ) and requests an accommodation, even if there has been no change in the employee's medical condition.

# Undue Hardship

- ◆ Factors to be taken into consideration to determine “undue hardship” include:
  - the overall size of the business and its budget;
  - the benefit provided by the accommodation toward removing the impediment to performance caused by the disability;
  - the hardship, costs or problems it will cause for the employer, including those that may be caused for other employees.

# Drug & Alcohol Use

- ◆ No protections offered to persons for current illegal drug use, or current alcohol use under the NYSHRL.
- ◆ Persons who are recovered alcoholics or drug users, or are in a rehabilitation program ARE CONSIDERED persons with disabilities, and are afforded protection under the law.
- ◆ Adjustments to the work schedule, where needed to allow for ongoing treatment, must be allowed as an accommodation where reasonable, if the individual is still able to perform the essential functions of the job including predictable and regular attendance.

- ◆ While employers are prohibited from making inquiries about an employee or job applicant's disability, they are permitted to conduct drug testing of employees.
- ◆ The recovered/recovering alcoholic or drug user should be expected to perform job tasks just as anyone else with similar skills, experience and background. An alcoholic may be fired for violation of workplace rules against drinking or being drunk on the job.

# Misconduct & Direct Threat

- ◆ The NYSHRL does not require accommodation of behaviors that do not meet the employer's workplace behavior standards that are consistently applied to all similarly situated employees, even if these are caused by a disability.

◆ This would include, but not be limited to:

- dress codes, grooming standards and time and attendance policy, though reasonable and necessary deviations must be allowed as accommodations;
- conduct standards, including those which prohibit aggressive or threatening behavior;
- discipline for intoxication or impairment on the job by an alcoholic.

- ◆ Reasonable accommodation is not required where the disability or the accommodation itself poses a “direct threat”.
- ◆ “Direct threat” means a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.

- ◆ In determining whether a “direct threat” exists, the employer must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge, or the best available objective information to ascertain:
  - the nature, duration and severity of the risk;
  - the probability that the potential injury will actually occur; and
  - whether reasonable accommodations, such as modification of policies, practices or procedures will mitigate the risk.

# The Interactive Process

- ◆ New York State regulations set forth the obligations of both the employer and employee to engage interactively in the reasonable accommodation process.

# Employer's Obligations in the Interactive Process

## ◆ Employer's obligations include:

- providing information to applicants and new employees as to their rights with regard to reasonable accommodation of disability, and as to procedures to be followed in requesting reasonable accommodation;
- the duty to move forward to consider accommodation once the need for accommodation is known or requested. Once the accommodation is under consideration, the employer has the right to medical or other information that is necessary to verify the existence of the disability, or that is necessary for consideration of the accommodation. The employer must maintain the confidentiality of individual's medical information;
- the right to select which reasonable accommodation will be provided, so long as it is effective in meeting the need.

# Employee's Obligations in the Interactive Process

- ◆ Employees requesting accommodation for disability must:
  - make the disability and need for accommodation known to the employer, and has the right to request an accommodation at any time, even if his or her medical condition has not changed;
  - cooperate with the employer in the consideration and implementation of the requested reasonable accommodation;
  - cooperate in providing medical or other information that is necessary to verify the existence of the disability or what is necessary for consideration of the accommodation.

# The Interactive Process

- ◆ With regard to whether absence of the interactive process itself is grounds for employer liability, the Appellate Division Second Department held in *Hayes v. Estee Lauder Companies, Inc.*, that
- ◆ “the New York State Human Rights Law did not require that employer engage in an interactive process with employee for purposes of assessing whether the employee's disability, which included employee's limited ability to walk following two surgeries to his left knee, could be reasonably accommodated, so long as any breakdown in such process did not lead to the employer's failure to provide a reasonable accommodation.” [\[1\]](#)
- ◆ [\[1\]](#) [34 A.D.3d 735, 825 N.Y.S.2d 237](#), (2nd Dept. 2006).

# Your Business as a Place of Public Accommodation

- ◆ Effective, January 1, 2008, places of public accommodation are obligated to ensure access to goods, services and facilities by making reasonable accommodations for persons with disabilities.
- ◆ The New York State Division of Human Rights has jurisdiction to investigate and hold public hearings on complaints alleging disability discrimination against places of public accommodation.

# Place of Public Accommodation Defined

- ◆ Places of Public Accommodation as defined under the NYSHRL cover most businesses and places that are open to the public, including:
  - ◆ Hotels, motels
  - ◆ Restaurants, diners & bars
  - ◆ Retail stores
  - ◆ Health clinics & hospitals
  - ◆ Movie theatres
  - ◆ Amusement and recreation parks
  - ◆ Public parking garages

## Reasonable Modifications of Rules, Practices or Procedures

- ◆ Places of public accommodation must make reasonable modifications to policies, practices or procedures to make their goods, services and facilities accessible to persons with disabilities, unless it fundamentally alters the nature of the public accommodation.

# Reasonable Modifications of Rules, Practices or Procedures

- ◆ Examples of modifying a rule, practice or procedure to provide access include:
  - Implementing policies to ensure staff are trained to assist and accommodate persons with disabilities to access goods, services, or facilities within a place of public accommodation.
  - Provide curbside service or home delivery of goods or services where it is reasonable to do so.

# Auxiliary Aids & Services

- ◆ Places of Public Accommodation must take such steps to ensure that no individual with a disability is excluded or denied services because of the absence of auxiliary aids and services, UNLESS such person can demonstrate that taking such steps would FUNDAMENTALLY ALTER the nature of the public accommodation, or would result in an UNDUE BURDEN.

# Auxiliary Aids & Services

- ◆ Examples of auxiliary aids and services include:
- ◆ qualified interpreters or other effective methods of communicating with individuals with hearing impairments;
- ◆ qualified readers, taped texts or other effective methods of making visually delivered materials available to individuals with visual impairments;
- ◆ acquisition or modification of equipment or devices

## **Removal of Architectural Barriers under the NYSHRL**

**Places of public accommodation must remove architectural barriers where it is readily achievable to do so, in order to make their premises accessible to persons with disabilities.**

# Examples of Barrier Removal Cont'd

- ◆ rearranging tables, chairs, vending machines, display racks, and other furniture;
- ◆ installing flashing alarm lights;
- ◆ installing offset hinges to widen doorways for a wheelchair-user;
- ◆ eliminating a turnstile or providing an alternative accessible path;
- ◆ installing accessible door levers;
- ◆ installing grab bars in toilet stalls;
- ◆ installing a handicap accessible bathroom stall;
- ◆ creating designated accessible parking spaces;

# Federal Tax Incentives

- ◆ Businesses can take advantage of two federal tax incentives available to help cover costs of making access improvements for customers with disabilities.

# Federal Tax Incentives

- A tax credit for small businesses that remove access barriers from their facilities, provide accessible services, or take other steps to improve accessibility for customers with disabilities. Small businesses with 30 or fewer employees or total revenues of \$1 million or less can use the Disabled Access Credit (Internal Revenue Code, Section 44). Eligible small businesses may take a credit of up to \$5,000 to offset their costs for access, including barrier removal from their facilities (e.g., widening a doorway, installing a ramp), provision of accessibility services (e.g., sign language interpreters), provision of printed material in alternate formats (e.g., large-print, audio, Braille), and provision or modification of equipment.

# Federal Tax Incentives

- A tax deduction for businesses of all sizes that remove access barriers in their facilities or vehicles. Businesses of all sizes may take advantage of this tax deduction. Under Internal Revenue Code, Section 190, businesses can take a business expense deduction of up to \$15,000 per year for costs of removing barriers in facilities or vehicles.

# Federal Tax Incentives

- ◆ A business that annually incurs eligible expenses to bring itself into compliance with the Americans with Disabilities Act may use these tax incentives every year. The incentives may be applied to a variety of expenditures; however, they may not be applied to the costs of new construction. All barrier removal must comply with applicable federal accessibility standards.
- ◆ For more on tax incentives see [www.ada.gov/taxpack.htm](http://www.ada.gov/taxpack.htm).

## **Guide Hearing & Service Dogs under the NYSHRL**

- ◆ Effective October 1, 2007, the NYSHRL was amended to prohibit any covered entity from discriminating against a blind person, a hearing impaired person, or a person with a disability on the basis of his or her use of a guide dog, hearing dog or service dog.

# Definition of Guide, Hearing, Service Dogs under the NYSHRL

- ◆ The New York State Human Rights law defines guide, hearing and service dogs as follows:
- ◆ Guide dog: any dog that is trained to aid a person who is blind by a recognized guide dog training center or professional guide dog trainer, and is actually used for such purpose.
- ◆ Hearing dog: any dog that is trained to aid a person with a hearing impairment by a recognized hearing dog training center or professional hearing dog trainer, and is actually used for such purpose.
- ◆ Service dog: any dog that is trained to work or perform specific tasks for the benefit of a person with a disability by a recognized service dog training center or professional service dog trainer, and is actually used for such purpose.